

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

THOMAS J. VAN KEIRSBILCK)	
Claimant)	
VS.)	
)	Docket No. 228,915
HANOVER DEVELOPMENT COMPANY)	
Respondent)	
AND)	
)	
ZURICH U.S.)	
Insurance Carrier)	

ORDER

Claimant appeals the March 15, 2004 Award of Administrative Law Judge Kenneth J. Hursh. Claimant was denied workers compensation benefits after the Administrative Law Judge (ALJ) found that claimant had failed to prove he was injured out of and in the course of his employment with Hanover. The Appeals Board (Board) heard oral argument on September 21, 2004. Stacy Parkinson was appointed as Board Member Pro Tem for the purposes of this appeal as Board Member Julie Sample was the ALJ presiding at the preliminary hearing of May 4, 1998, and, therefore, recused herself from this matter.

APPEARANCES

Claimant appeared by his attorney, James M. Sheeley of Kansas City, Kansas. Respondent and its insurance carrier appeared by their attorney, Denise E. Tomasic of Kansas City, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge.

ISSUES

- (1) Whether the relationship of employer-employee existed between claimant and Hanover on the date of accident.
- (2) Whether claimant suffered accidental injury arising out of and in the course of his employment.
- (3) Whether claimant is entitled to medical expenses and reimbursement for out-of-pocket medical expenses from respondent.
- (4) Whether claimant is entitled to future medical expense.
- (5) Whether claimant is entitled to a penalty for the alleged unreasonable refusal by respondent to provide medical compensation and disability compensation in a timely manner.
- (6) The nature and extent of claimant's injury and disability.

Claimant originally appealed the ALJ's failure to award temporary total disability compensation benefits. However, at oral argument before the Board, the parties stipulated that the issue involving temporary total disability compensation had been resolved and was no longer before the Board for its determination.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the Administrative Law Judge should be reversed and claimant should be awarded a 72 percent permanent partial general disability based upon his functional impairment as provided under K.S.A. 1997 Supp. 44-510e.

On October 28, 1997, claimant was assisting a track loader operator clear trees on a property, identified as the Gleason Road property, when a large tree, which was being transported by the track loader, fell from the bucket of the loader, striking claimant, causing serious injuries.

The property on which the injury occurred belonged to an entity identified as Tom Van, Inc., a corporation solely owned by claimant and his wife, Asta Van Keirsbilck.

Claimant testified that at the time of the injury, he was in the employ of Hanover Development Company (Hanover), a residential development partnership, of which Tom

Van, Inc., claimant's corporation, was a partner, along with Wayne Smith, Richard Akers and claimant's sons Michael Van Keirsbilck and Tom Van Keirsbilck. Claimant and Mr. Smith basically ran Hanover, drawing salaries and splitting the profits evenly with the other partners.

Hanover would purchase ground, develop it and sell the lots to builders. Claimant's job for Hanover was in a supervisory capacity. He would meet with engineers, coordinate with different subcontractors to lay out and create the streets, obtain the grading, install sewers and utilities, and finalize streets and curbs. His initial job duties included clearing a piece of property to determine whether it was appropriate for development.

Claimant had worked for Hanover for over 20 years, with over 15 of those years being in the capacity of supervisor and coordinator of development. He regularly worked with different subcontractors and was insured for workers compensation purposes through Hanover's workers compensation policy.

The property on Gleason Road, where claimant was injured, was a property owned by Tom Van, Inc., a corporation which claimant acknowledged he and his wife owned. Claimant testified that he was doing the cleanup site work at Gleason, with the ultimate purpose being that the property would be offered to Hanover for development. Claimant acknowledged that at the time of the injury, Hanover had no ownership interest in the Gleason Road property and that he had not discussed the possibility of developing the Gleason Road property with Hanover. Claimant did testify that he planned to meet with the Hanover partners the Monday after the injury to discuss the possibility of transferring ownership of the property to Hanover for development. Claimant acknowledged that he had considered keeping the property for his own personal use if Hanover was not interested in buying it, but the first offer would be to Hanover for development.

Claimant testified that other partners had, in the past, obtained pieces of property and had offered Hanover a chance to purchase the property. However, claimant agreed that Tom Van, Inc., had never before done that. There was at least one other time when claimant cleared land not owned by Hanover to determine the land's feasibility as a Hanover project. Claimant's testimony was uncontradicted he was the only employee of Hanover who usually cleared the land to determine the feasibility of development. According to claimant, the Hanover parties were aware the Gleason Road project was being cleared for possible development.

At the time of the injury, claimant was being paid \$3,750-a-month salary and, in addition, would receive shares of the partnership income from Hanover. After the injury, claimant, being unable to perform his duties, continued drawing his salary for a period of time, paying his son a portion of the monies in exchange for the son performing duties formerly performed by claimant. In January 1999, Hanover quit paying claimant's salary, with the last wages claimant received being in December 1998.

Claimant suffered significant injuries as a result of the tree falling on him, including fractured vertebrae, fractured ribs, a punctured lung and a fractured scapula. Claimant was examined and/or treated by numerous health care providers, including board certified orthopedic surgeon E. Bruce Toby, M.D. Dr. Toby saw claimant on numerous occasions, ultimately releasing him from his care on March 30, 2001. He testified that as a result of these injuries, claimant suffered a 91 percent permanent partial impairment to the left upper extremity pursuant to the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). He acknowledged that claimant sustained severe injuries in other parts of his body, but he was treating claimant for the brachial plexus problems in his left upper extremity only. Therefore, he limited his functional impairment to the left upper extremity. The doctor agreed claimant had transverse process fractures of the lumbar and cervical spine, but as he was not treating claimant for those conditions, he provided no impairment rating. Likewise, he made no determination of what, if any, range of motion limitations claimant had in his cervical spine.

Dr. Toby placed significant restrictions upon claimant, testifying that claimant was unable to perform much, if any, activities with his left upper extremity. Of the five tasks presented to Dr. Toby, he felt claimant able to perform three of the five, including using a cell phone, operating a personal vehicle and attending meetings. Dr. Toby felt claimant was unable to perform the supervisory job involved in development of property or any of the physical duties, such as operating equipment and performing physical labor-type jobs at the job site. Therefore, based upon Dr. Toby's opinion, claimant would have a 40 percent loss of former work tasks.

Claimant was referred by respondent's attorney to James S. Zarr, M.D., board certified in physical medicine and rehabilitation and electrodiagnostic medicine, for an examination on January 13, 2004. Dr. Zarr had initially seen claimant while claimant was in the hospital after the October 28, 1997 accident. He set claimant up in an inpatient rehabilitation program and helped claimant obtain independent functional abilities as much as possible before his discharge. He treated claimant through March 1998, but claimant failed to return for follow up after that.

The next time he saw claimant was the January 13, 2004 examination set up by Ms. Tomasic, respondent's attorney. At that time, Dr. Zarr determined that claimant had reached maximum medical improvement, but with a resulting 100 percent impairment of the left upper extremity at the level of the shoulder. He testified that essentially claimant's left upper extremity was nonfunctional, which equates to a 60 percent impairment to the body as a whole pursuant to the AMA *Guides* (4th ed.). The only restrictions he placed upon claimant were that claimant would be unable to use the left arm for any activities. Dr. Zarr was also provided the same list of five tasks earlier presented to Dr. Toby. Dr. Zarr found claimant could perform four out of the five tasks, for a 20 percent task loss. He opined that claimant was able to supervise the development of property, but unable to

perform any of the physical duties associated with that supervision. He acknowledged that while his functional impairment is only to the left upper extremity, claimant did have injuries associated with the C6, C7 and C8 sections of claimant's cervical spine. He also acknowledged that claimant suffered an injury to his low back as a result of the October 28, 1997 accident and testified it would not be unusual for claimant to experience pain in the low back as a result of those injuries. He agreed if claimant was experiencing a loss of range of motion in the neck, he would be entitled to a disability in the area of the neck also. He, however, testified that in his opinion, the impairment from the accident manifested itself as an impairment to the left upper extremity at the level of the shoulder only. Therefore, his functional impairment rating was limited to the left upper extremity at the level of the shoulder.

Claimant was referred by his attorney to Edward J. Prostic, M.D., a board certified orthopedic surgeon, for an examination on February 13, 2001. He diagnosed claimant with fractures of the neck and low back, multiple soft tissue injuries and significant rib fractures as well. He assessed claimant an 80 percent impairment to the body as a whole on a functional basis. However, on cross-examination, when asked to utilize the *AMA Guides* (4th ed.), Dr. Prostic opined that that would result in a 15 percent impairment to the body as a whole for the neck injuries and a 15 percent impairment to the body as a whole for the low back injuries and a 60 percent impairment for the left upper extremity, which results in an overall whole body impairment of 72 percent pursuant to the *Guides*.

Dr. Prostic was not provided the task list given to Dr. Zarr and Dr. Toby. However, he did testify that claimant would be able to continue as director of the company, but would be no longer able to work as a laborer in any capacity. Claimant could, however, continue as a supervisor, which is identical to the opinion expressed by Dr. Zarr.

In workers compensation litigation, it is the claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.¹

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination.²

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an

¹ K.S.A. 1997 Supp. 44-501 and K.S.A. 1997 Supp. 44-508(g).

² *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.³

The two phrases arising “out of” and “in the course of” employment, as used in our Workers Compensation Act, K.S.A. 44-501 *et seq.*, have separate and distinct meanings The phrase “out of” employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. . . . [A]n injury arises “out of” employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase “in the course of” employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.⁴

Respondent argues that claimant's ownership of the property eliminates any employment connection between him and Hanover on the date of the accident. Claimant counters that a subcontractor, identified as Ronnie Weers (who regularly worked for Hanover), provided the track loader and the driver who was working with claimant on the date of the accident. However, while Hanover initially paid for the work performed by the subcontractor's laborer, it is acknowledged that ultimately claimant repaid respondent by having his salary withheld two months in a row. Finally, respondent argues that after the accident, claimant retained ownership of the property, first building a barn and later building a personal residence on the property. Claimant's wife, Asta Van Keirsbilck, testified that initially the property was to be provided to Hanover, but after the accident she felt claimant desperately needed something to occupy his mind and, therefore, determined that the barn, and later the residence, should be built in order to give claimant something to do.

Here, claimant was injured while performing activities which he regularly performed for Hanover. Claimant's job required he supervise the development of land, first assessing whether it is appropriate for the partners to use for development purposes. While it is acknowledged that the property was owned by claimant's corporation, Tom Van, Inc., at the time of the accident, it was not unusual for partners of Hanover to buy property for the purpose of offering it to respondent for development. Claimant testified his purpose was just that—to buy the property, assess its value and then offer the property to Hanover (which he was going to do the following Monday after the accident) for the purpose of assessing Hanover's desire to develop the property. The Board finds it significant that claimant works for no other entity other than Hanover and that Tom Van, Inc., does no outside work not connected to Hanover. Claimant was being paid a salary by Hanover at the time of the injury, with his only other source of income being a share of the profits from the Hanover partnership. Additionally, at the time of the injury, claimant, who was supplied

³ K.S.A. 1997 Supp. 44-501.

⁴ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

with a telephone by Hanover, was using the telephone, conducting Hanover business on the Gleason Road property.

The Board finds, based upon the evidence, that claimant was an employee of Hanover, performing employment duties at the time of the accident and the injury, therefore, arose out of and in the course of his employment with Hanover.

K.S.A. 1997 Supp. 44-510e defines permanent partial general disability as,

. . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.⁵

In determining claimant's entitlement to a permanent partial general disability, first a determination must be made regarding what, if any, functional impairment claimant suffered. Functional impairment is defined as,

. . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.⁶

In this case, three doctors provided opinions regarding what, if any, functional impairment claimant may have suffered. Both Dr. Zarr and Dr. Toby limited their impairment ratings to claimant's left upper extremity, although both acknowledged he suffered substantial injuries to his cervical and lumbar spine, as well. The only doctor who testified in this matter, providing a functional impairment encompassing all of claimant's injuries, was Dr. Prostic. Dr. Prostic initially assessed claimant an 80 percent functional impairment to the body, but when pressed regarding the *AMA Guides* (4th ed.), acknowledged that claimant's impairment would be 72 percent to the body as a whole. The Board, therefore, finds that claimant is entitled to a 72 percent permanent partial general disability under K.S.A. 1997 Supp. 44-501e.

⁵ K.S.A. 1997 Supp. 44-510e(a).

⁶ K.S.A. 1997 Supp. 44-510e(a).

Both Dr. Toby and Dr. Zarr provided opinions regarding what, if any, task loss claimant suffered. Dr. Prostic, while not specifically addressing the tasks, gave testimony very similar to that of Dr. Zarr, who assessed claimant a 20 percent task loss pursuant to K.S.A. 1997 Supp. 44-510e. The Board also determines, based upon the extent of injuries that claimant has suffered, that he is entitled to a 100 percent loss of wages under K.S.A. 1997 Supp. 44-510e. The statute requires that the task and wage loss be averaged with each other in determining the permanent partial general disability. If the Board considers claimant's wage loss to be 100 percent and accepts the highest task loss opinion in the record of 40 percent, claimant's permanent partial general disability will only be 70 percent to the body as a whole. K.S.A. 1997 Supp. 44-510e states,

In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.⁷

The Board, therefore, finds that claimant is entitled to a 72 percent permanent partial general disability based upon claimant's functional impairment for the injuries suffered on October 28, 1997.

With regard to the remainder of the issues, the parties have stipulated to certain medical expenses associated with claimant's ongoing treatment, and the Board adopts those stipulations, awarding claimant his reasonable medical care, as was provided as a result of the October 28, 1997 accident.

Claimant argues entitlement to a penalty for the alleged unreasonable refusal by respondent to provide medical compensation and disability compensation in a timely fashion. The penalty statute, K.S.A. 44-512b(a) (Furse 1993), allows for a penalty in the form of interest to be assessed when it is determined that there was not just cause or excuse for the failure of an employer or insurance company to pay, prior to an award, the compensation claimed to the person entitled thereto.

The Board determines that claimant is not entitled to a penalty under these circumstances. The dispute regarding whether claimant was acting as an employee of respondent at the time of his accident or whether his accidental injury arose out of and in the course of employment was not a trivial or bogus dispute, but was instead based upon a legitimate question regarding claimant's employment relationship at the time of the injury. The fact that claimant's corporation owned the property at the time of the injury and the property had yet to be offered to respondent created a significant question in this matter, justifying respondent's unwillingness to voluntarily pay benefits associated with this litigation. The Board, therefore, determines that claimant is not entitled to a penalty under K.S.A. 44-512a (Furse 1993).

⁷ K.S.A. 1997 Supp. 44-510e(a).

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Kenneth J. Hursh dated March 15, 2004, should be, and is hereby, reversed and claimant is awarded a permanent partial general disability to the body as a whole for a 72 percent functional disability to the body for the injuries suffered on October 28, 1997.

Claimant is awarded 284.9 weeks of permanent partial general disability compensation at the statutory maximum rate of \$351 per week for a total of \$100,000. As of the time of this award, the entire amount is due and owing and ordered paid in one lump sum, minus any amounts previously paid.

Claimant is further awarded the medical expenses as stipulated by the parties at the regular hearing.

Claimant is additionally entitled to future medical upon application to and approval by the Director.

Additionally, claimant is entitled to out-of-pocket expenses as are detailed and listed in the first, second and third stipulations entered into between the parties prior to submission of the matter to the ALJ.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against respondent and its insurance carrier to be paid as follows:

Richard Kupper & Associates

Deposition of Dr. Edward Bruce Toby	\$345.40
Deposition of Dr. James S. Zarr	\$446.50
Deposition of Thomas Van Keirsbilck	\$220.35

Metropolitan Court Reporters

Deposition (Cont.) of Asta Van Keirsbilck	\$308.45
Deposition of Asta Van Keirsbilck	\$388.60
Deposition of Dr. Edward J. Prostic	\$248.30
Deposition of Leslie Watson	\$507.90
Deposition of Thomas Van Keirsbilck	\$474.50
Regular Hearing transcript	\$326.20
Preliminary Hearing transcript	\$170.10

Jay E. Suddreth & Associates, Inc.
Deposition of Thomas Van Keirsbilck

\$253.60

IT IS SO ORDERED.

Dated this ____ day of December 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER PRO TEM

DISSENT

The undersigned respectfully dissent from the opinion of the majority.

In order for claimant to obtain benefits under the Workers Compensation Act, he must prove that he suffered accidental injury arising out of and in the course of his employment with respondent.⁸ This requires at the time of the injury that claimant's injuries occur while claimant is acting in his capacity as an employee of respondent.⁹ The undersigned Board Members acknowledge that claimant occasionally performed similar duties for respondent as those tasks claimant was performing at the time of the injury. However, at the time of his injury, claimant was performing those duties for himself through his corporation, Tom Van, Inc.

An injury arises out of employment where it is shown that a causal connection between the conditions under which the work is required to be performed and the resulting injury occur. The injury must arise "out of" employment, coming from the nature,

⁸ K.S.A. 1997 Supp. 44-501.

⁹ *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984).

conditions, obligations and incidents of the employment.¹⁰ Both elements, in the course of employment and out of employment, must be met in order for the accident to be compensable.

The uncontradicted evidence in this case is that claimant through his corporation, Tom Van, Inc., owned the Gleason Road property. There is no evidence to indicate that respondent ever held any ownership interest in that property. Claimant acknowledged he had not spoken to the developers or the partners at Hanover about that particular property, although he said he planned to do so in the future. However, claimant's future plans do not create an employment relationship in this instance.

Claimant's relationship with respondent regarding the Gleason Road property was more that of seller rather than an employee. Claimant owned investment property that he was considering offering to respondent, presumably at a profit to himself.

In this instance, respondent Hanover had no legal or equitable interest in the Gleason Road property, as the property was solely owned by Tom Van, Inc., a corporation owned exclusively by claimant and his wife. There had not only been no transfer of ownership to Hanover, there had been no discussions regarding the possibility of transfer of ownership at the time of the accident. Therefore, with regard to the Gleason Road property, there is no evidence to support a finding that claimant was working in his employment capacity with respondent Hanover at the time of the accident, but was instead working independently on a piece of property owned by claimant's corporation and which was ultimately developed by claimant and his wife for their personal use.

The undersigned Board Members would, therefore, find that claimant did not suffer personal injury by accident arising out of and in the course of his employment, because, at the time of his injury, there was no employment relationship between claimant and respondent with regard to that specific piece of property nor for the work claimant was performing at the time of his injury. Claimant is not entitled to workers compensation benefits for the injuries suffered on October 28, 1997. Therefore, the original award of Administrative Law Judge Kenneth J. Hursh should be affirmed.

BOARD MEMBER

BOARD MEMBER

¹⁰ *Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973).

c: James M. Sheeley, Attorney for Claimant
Denise E. Tomasic, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director